Younger Supreme Court Opens Important New Term

By Ben Feuer and Michael Gadeberg

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A new majority appeared on the U.S. Supreme Court this past Monday when the justices took the bench for the first oral arguments of the 2010-2011 term. It wasn't a liberal or conservative bloc, however, and had nothing to do with either originalism or active liberty. Rather, for the first time, baby boomers (Justices John G. Roberts Jr., Elena Kagan, Sonia Sotomayor, Samuel A. Alito Jr., and Clarence Thomas, all born after 1946) comprise five of the Court's nine members.

The Court's docket reflects this modern shift. This term, the Court has chosen to address issues hardly conceivable a generation earlier such as informational privacy, video game violence, and prison overcrowding. Here are some of the questions the Court will wrestle with between now and next June:

Do corporations have a right of privacy under federal law? In *Federal Communications Commission v. AT&T*, the Court will decide whether AT&T can invoke the "personal privacy" exemption of the Freedom of Information Act to prevent the Federal Communications Commission from disclosing information collected in an investigation into whether the company overcharged for providing communications equipment to schools. Human beings have "personal privacy" under this FOIA exemption, and this case is one to watch in light of the *Citizens United* case last term, which found that corporations are "persons" with First Amendment rights to engage in political advocacy.

Does the First Amendment grant individuals a right to "informational privacy"? In *Nelson v. National Aeronautics & Space Administration*, the Court will review the 9th U.S. Circuit Court of Appeals' holding that this right was violated by a post-9/11 NASA requirement that federal contractors working in the fabled Jet Propulsion Laboratory, even scientists and engineers designated as "low risk," must undergo extensive background checks that include questions about past treatment for illegal drug use. The Court has not addressed "informational privacy" since the late 1970s, when it made fleeting reference to the concept. Now the question is reaching critical importance as computers collect more and more personal information.

Does the First Amendment protect a church that protests at funerals of fallen soldiers with signs that say "God Hates Fags" and "Thank God for IEDs"? In *Snyder v. Phelps*, the Court will decide whether the infamous Westboro Baptist Church, a "fire and brimstone" branch of evangelical Christianity that believes God punishes America for its tolerance of homosexuality, especially within the military, may invoke the First Amendment to defend against an emotional distress action by the father of a fallen Marine whose funeral Westboro protested and blogged about. Look for *Snyder* to shed some light on Justice Kagan's views of the First Amendment.

Can California prohibit the sale of violent video games to minors? In *Schwarzenegger v. Entertainment Merchant's Association*, the Court will decide whether the 9th Circuit correctly held that a California statute making it a crime to sell video games to minors in which "an image of a human being" may be killed, maimed or assaulted in a way that appeals to a "deviant or morbid interest" violates the First Amendment. The most compelling aspect of this case is about whether the government may treat violent media content the same way it does sexual obscenity, as a form of speech exempt from most First Amendment protections. The Court has never before extended its obscenity analysis past sexual speech, and its decision in *United States v. Stevens* last term, discarding a law prohibiting videos of animal cruelty, suggests it may not be eager to do so.

Can a state give tax credits for parents to enroll their children in private religious schools? In *Arizona Christian School Tuition Organization v. Winn*, the Court will determine whether the 9th Circuit was right when it held that an Arizona law that funds private school scholarship organizations violates the Establishment Clause because many of those organizations restrict scholarships to students attending religious schools. Look for the Court to parse this one carefully on the facts, but with a lousy economy starving many public schools of needed funds, and parents keener than ever to see their kids in private education, constitutional controversies over programs like Arizona's are unlikely to go away anytime soon.

Can prosecutors present the testimony of a recently wounded victim identifying his attacker if the victim does not appear at trial? Michigan v. Bryant is yet another case to test the limits of the Court's 2004 decision in *Crawford v. Washington*, which held that the Confrontation Clause precludes the admission at trial of "testimonial" statements unless the witness is present for cross-examination. In *Bryant*, the Court will decide whether a statement made by a mortally wounded victim to police shortly after being shot, naming and giving the whereabouts of his assailant, was made for the purpose of assisting police to respond to an "ongoing emergency." If so, the testimony would qualify as "non-testimonial" and be admissible under *Crawford*, despite the deceased victim's absence at the defendant's murder trial.

Must California reduce its prison population by 46,000 inmates? In January, a specially convened three-judge district court ordered California to reduce the population of its 33 adult prisons to no more than 137.5 percent of their design capacity within two years. The Court granted review in *Schwarzenegger v. Plata* to determine whether the ordered population reduction is the "least intrusive means" to correct the continuing violations of inmates' rights to adequate health care, and whether the lower court properly considered the potential adverse impact on public safety. The case has the potential to resolve long-standing questions about the scope of federal courts' power to manage state prisons and the tools available to remedy unconstitutional conditions.

May Arizona compel employers to check the immigration status of job applicants and revoke the licenses of businesses that hire undocumented workers? The Obama administration has joined business and civil liberties groups in arguing that federal immigration law pre-empts an Arizona statute that requires companies to use a federal employment eligibility verification system. *Chamber of Commerce v. Whiting* is the first case challenging Arizona's efforts at combating illegal immigration to reach the Court, and it may offer clues as to the fate of the even more controversial SB 1070, which requires Arizona police to determine an individual's immigration status during a stop or arrest.

When may states regulate businesses more strictly than the federal government does? A trio of pre-emption cases will provide further insight into the Roberts Court's approach to federalism, pitting the business-friendly doctrine of pre-emption against the traditional notion that state sovereignty allows individuals to rely on state law when bringing an action against a corporation, even a federally regulated one, that operates within the state. First, in *Williamson v. Mazda*, the Court will decide whether federal safety regulations permitting the use of lap-only seatbelts in the rear seats of a minivan pre-empt state tort law and preclude an accident victim from suing a car manufacturer for negligence for failing to install lap-and-shoulder belts. Next, in *Bruesewitz v. Wyeth*, the Court will face the question of whether the National Childhood Vaccine Injury Act, which expressly pre-empts claims against vaccine manufacturers for injuries resulting from "unavoidable" vaccine side effects, categorically prevents all vaccine-related injury claims, whether it permits a victim to assert a design defect claim alleging "avoidable" side effects. (Chief Justice Roberts sold his stock in Wyeth's parent to participate in this one.) Finally, *AT&T Mobility v. Concepcion* asks whether AT&T may enforce a ban on class actions, including class-wide arbitration, in its arbitration agreements with customers. The 9th Circuit concluded that AT&T's class action waiver was unenforceable because it was both procedurally and substantively unconscionable under California law, but AT&T argues that the Federal Arbitration Act pre-empts California's unconscionability law.

The Court has not yet finished granting this term's petitions for *certiorari*, and the cases coming down the pipeline — including a pair involving police use of GPS devices to track suspects — seem likely to follow the issues important to the Court's newest majority. Stay tuned for what promises to be an exciting year.

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Letter to the Editor

Proposition 23 Holds Environmental Left to Its Promise

Jennifer Berg has it all wrong. In *"Don't Mess with California: Why Proposition 23 Is Harmful"* (Oct. 6), voting yes would be liberation from the environmental left. In 2006, Sacramento's rocket-scientists enacted AB 32, imposing draconian restrictions on carbon dioxide emissions (yes, that's the stuff you exhale). They promised to save the planet from "global warming" and open a cornucopia of new jobs. Since then, California's unemployment rate has shot far beyond the national unemployment rate and the earth has continued to warm and cool as it has for billions of years.

Proposition 23 merely holds the environmental left to its promise: It suspends AB 32 until unemployment stabilizes at or below its pre-AB 32 level.

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